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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 UNITED STATES OF AMERICA,
12
13 vs. Plaintiff,
14 DORIAN SHAREEF FOWLER,
15 Defendant.

CASE NO. 11cr4522-LAB-1 and
16cv2831-LAB

**ORDER DENYING MOTION
PURSUANT TO 28 U.S.C. § 2255**

16 Defendant Dorian Shareef Fowler was convicted at trial of one count of importing
17 cocaine. He took a direct appeal, which was denied on October 18, 2013, and the Ninth
18 Circuit's mandate issued on November 13, 2013. He did not file a petition for writ of
19 *certiorari*. Judgment therefore became final 90 days after October 18, 2013, on January 16,
20 2014. See *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987); *United States v. Garcia*, 210
21 F.3d 1058, 1061 and n.6 (9th Cir. 2000).

22 On April 7, 2015, Fowler filed a *pro se* motion under 18 U.S.C. § 3582(c) for reduction
23 of his sentence. The Court denied his claims on November 4, 2016.¹ Then on November
24 17, 2016, he filed a motion under 28 U.S.C. § 2255. On December 1, 2016, Fowler
25 appealed the denial of his § 3582(c) motion. The Ninth Circuit affirmed the Court's denial
26 of Fowler's § 3582(c) motion and the mandate was spread on January 9, 2018.

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28 ¹ The Court summarily denied his motion without prejudice under General Order 642.
Fowler's claims were then refiled by counsel. The Court then denied the renewed claims.

1 The Court now turns to Fowler’s pending § 2255 motion. Under § 2255(f), claims are
2 subject to a one-year limitations period. Here, that period began to run on the date Fowler’s
3 conviction became final, *i.e.*, on January 16, 2014. The one-year limitations period expired
4 a year later. But he did not file his 2255 motion until another year and ten months had
5 elapsed. Unless he is entitled to tolling for some reason, his claims are therefore time-
6 barred.

7 Fowler’s filing of his § 3582(c) motion did not prevent his judgment from becoming
8 final so as to delay the onset of the one-year limitations period. *See United States v.*
9 *Schwartz*, 274 F.3d 1220, 1223–24 (9th Cir. 2001) (citing 18 U.S.C. § 3582(b)) (holding that
10 neither a Fed. R. Crim. P. 35 motion nor a § 3582(c) motion prevents a conviction from
11 becoming final for § 2255 purposes). Nor did the pendency of his § 3582(c) motion toll the
12 limitations period. *See id.* at 1224 (holding that petitioner was not entitled to tolling of
13 § 2255’s limitations period).

14 Furthermore, Fowler cannot establish that he was pursuing his rights diligently but that
15 some extraordinary circumstance prevented him from filing a timely § 2255 motion. *See*
16 *United States v. Castro-Verdugo*, 750 F.3d 1065, 1071 (9th Cir. 2014). The fact that he was
17 able to file of his own *pro se* § 3582(c) motion on April 7, 2015 makes this clear. *See*
18 *Ramirez v. Yates*, 571 F.3d 993, 998 (9th Cir. 2009) (rejecting petitioner’s claim that he was
19 unable to prepare and file a habeas petition, because the record showed he could and did
20 file other substantial motions during the same time period).

21 Because the claims Fowler raises in his § 2255 motion are all time-barred by nearly
22 two years, his motion is **DENIED**.

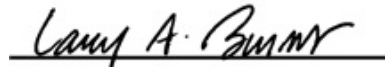
23 Even assuming Fowler’s claims were not time-barred, they would be denied for other
24 reasons. Except for his claims of ineffective assistance of counsel (which lack merit),² all of
25 his claims could have been raised on direct appeal, and are therefore defaulted. *See*
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27 ² Fowler’s motion identifies numerous “errors” that in fact were either not errors at all,
28 were beyond his counsel’s control, were not reasonably likely to have prejudiced him, or
amounted to mere differences of opinion about trial strategy. *See Strickland v. Washington*,
466 U.S. 668, 694 (1984).

1 *Massaro v. United States*, 538 U.S. 500, 504 (2003); *Bousley v. United States*, 523 U.S. 614,
2 621 (1998). By way of excusing his default, Fowler claims his counsel failed to consult with
3 him about what claims to raise on appeal. But, as the Supreme Court has recently
4 reiterated, “appellate counsel should not raise every nonfrivolous argument on appeal, but
5 rather only those arguments most likely to succeed.” *Davila v. Davis*, 137 S.Ct. 2058, 2067
6 (2017). The arguments Fowler points to are not more meritorious than the ones he actually
7 raised on direct appeal. The fact that he disagrees with his counsel’s reasonable decisions
8 about which issues to raise on appeal does not excuse the default. See *Reed v. Ross*, 468
9 U.S. 1, 13 (1984) (“[A]bsent exceptional circumstances, a defendant is bound by the tactical
10 decisions of competent counsel.”); *Jones v. Barnes*, 463 U.S. 745, 754 (1983) (appellate
11 counsel has no duty to raise every colorable claim a defendant suggests).

12 **IT IS SO ORDERED.**

13 DATED: January 18, 2018

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15 **HONORABLE LARRY ALAN BURNS**
16 United States District Judge
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